Supreme Court, U.S.
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87-2102

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF INDIANA,

Petitioner,

vs.

SIDNEY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit has decided erroneously and in a way in conflict with controlling decisions of this Court that the State of Indiana is liable for the costs of a trial transcript in a case in which the State is not a party and in which the Defendant State employees prevailed.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Facts Material to Consideration of the Question Presented	2
Reasons for Allowance of the Writ	4
The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With Controlling Decisions Of This Court That The State Of Indiana is Liable For The Costs Of A Trial Transcript In A Case In Which The State Is Not A Party And In Which The Defendant State Employees Prevailed	4
Conclusion	7
Appendix:	
Order of the Seventh Circuit, Dated April 4, 1988	A-1
Order of the Seventh Circuit, Dated May 23, 1988	A-2
Judgment of the District Court	A-3

TABLE OF AUTHORITIES

Cases: *Page*

Fairmont Creamery Co. v. Minesota, 275 U.S. 70, 48 S.Ct. 97, L.Ed. 168 6

Hutto v. Finney, 437 U.S. 678, 696 98 S.Ct. 2565, 2567, 57 L.Ed.2d 522 (1978), *rehearing denied*, 439 U.S. 1129 99 S.Ct. 1035 (1979)..... 4, 5, 6

Kentucky v. Graham, ___ U.S. ___ 105 S.Ct. 3099 (1985) 6

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(b) 2

42 U.S.C. § 1983..... 2, 4

42 U.S.C. § 1988..... 6

Rules:

Rule 17.1(c) 2

Rule 20.2 2

NO.

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Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF INDIANA,

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SIDNEY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the State of Indiana, respectfully prays this Court issue a Writ of Certiorari to review a decree/order of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in cause Number 87-2387 on April 4, 1988 which required the State of Indiana to pay for the preparation of a transcript of a trial in an appeal to which it is not a party and in which the respondent was not the prevailing party.

OPINIONS BELOW

The order of the Seventh Circuit issued April 4, 1988, has not been officially reported. A copy of the Order is appended hereto at page A-1. The Order of the Seventh Circuit, dated May 23, 1988, which denies reconsideration of this order is appended at

page A-2. The Judgment of the District Court is appended at page A-3.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 17.1(c) of the Rules of this Court to review a judgment or decree of a federal court of appeals that has decided a federal question in a way which conflicts with applicable decisions of this court.

The decree of the Seventh Circuit was entered on April 4, 1988. The Motion for Reconsideration was denied on May 23, 1988. This petition is timely filed in that it is filed prior to the expiration of the thirty (30) day period for interlocutory appeals allowed by 28 U.S.C. § 2101(b) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This petition arises from a decree by the Seventh Circuit that the State of Indiana pay for the preparation of a transcript in an appeal to which the State is not a party and in which the respondent was not the prevailing party.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Respondent, a prisoner at the Indiana Reformatory filed a civil complaint seeking damages pursuant to 42 U.S.C. § 1983

alleging failure to protect him from assualt by fellow inmates. The complaint named the Petitioner, State of Indiana, and several employees of the State of Indiana as defendants.

Prior to trial the District Court dismissed the State of Indiana as a defendant under the Eleventh Amendment. Retained counsel entered an appearance for Respondent after the complaint was filed but prior to trail. Respondent has been represented by counsel from that point to the present time. This cause of action came trial with four individually named employees of the Indiana Reformatory as the sole defendants.

After a bench trial the District Court entered judgment against the Respondent and in favor of the prison officials. Respondent filed a notice of appeal and a request to proceed in forma pauperis. The District Court denied leave to proceed in forma pauperis on the grounds that the appeal was frivilous. Respondent also requested that the Court of Appeals grant in forma pauperis status which request was denied by the Seventh Circuit.

The Respondent did not cause a transcript of the trial to be prepared. Respondent did not challenge the dismissal of the State of Indiana on appeal. Briefing was completed and the case was set for oral argument on April 4, 1988. At the oral argument the Seventh Circuit ordered the State of Indiana to prepare and file a transcript of the trial proceedings for use in the appeal. The Petitioner filed a Petition for Rehearing, which was construed by the Seventh Circuit as a Motion for Reconsideration, and a Motion for Stay. Both motions were denied by the Seventh Circuit on May 23, 1988.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With Controlling Decisions Of This Court That The State of Indiana Is Liable For The Costs Of A Trial Transcript In A Case In Which The State Is Not A Party And In Which The Defendant State Employees Prevailed

The Seventh Circuit ordered the State of Indiana to pay for a transcript in a § 1983 action for damages. The State was not a party to the appeal and the state employees who were parties to the appeal in their individual capacities had been the prevailing parties in the District Court.

It is true that costs of litigation have "traditionally been awarded without regard for the state's Eleventh Amendment immunity. The court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Hutto v. Finney*, 437 U.S. 678, 696, 98 S.Ct. 2565, 2576, 57 L.Ed.2d 522 (1978), *rehearing denied* 439 U.S. 1129, 99 S.Ct. 1035 (1979). As this Court noted in *Hutto v. Finney, supra*:

> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability.
>
> The power to make the award was supported by "the inherent authority of the Court in the orderly administration of justice as between all parties litigant." *Id.*, at 74, 48 S.Ct., at 99. A federal court's interest in orderly, expeditious proceedings "justifies [it] in treating the state just as any other litigant, and in imposing costs upon it" when an award is called for. *Id.*, at 77, 48 S.Ct., at 100.
>
> Just as a federal court may treat a State like any other litigant when it assesses costs, so also many Congress

> amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amedment immunity.

In cases involving injunctive relief, the Court held in *Hutto v. Finney, supra*, that:

> Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. *See Holt I*, 300 F.Supp., at 826. The State apparently paid earlier fee awards; and it was the State's lawyers who decided to bring this appeal, thereby risking another award.
>
> * * * *
>
> Like the Attorney General, Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S.Rep.No. 94-1011, p.5 (1976), U.S.Code Cong. & Admin.News 1976, p. 5913. Awards against the official in his individual capacity, in contrast, were not to be affected by the statute; in injunctive suits they would continue to be awarded only "under the traditional bad faith standard recognized by the Supreme Court in *Alyeska*." *Id.*, at 5 n. 7, U.S.Code Cong. & Admin.News 1976, p.5913. There is no indication in this case that the named defendants litigated in bad faith before the Court of Appeals. Consequently, the Department of Correction is the entity intended by Congress to bear the burden of the counsel-fees award.

Id., 437 U.S. at 700-701.1

However, nothing in *Hutto v. Finney, supra*, justifies the Circuit Court's order that the State of Indiana bear the cost of

preparing the transcript in this appeal, nor is there support for such an order from any other source.

Hutto v. Finney, supra, dealt with injunctive relief and was, for all practical purposes, a suit against the State of Arkansas. In the instant case, Jones' suit was a damage claim against specific state employees in their individual capacities in which the State was not a party either constructively or in any other fashion. In *Hutto v. Finney*, the defendant state employees were the losing parties. In the instant case, the defendant state employees were the prevailing party at trial, Jones was the losing party, and the U.S. District Court denied forma pauperis status because it considered the appeal frivilous.

In *Hutto v. Finney* and *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, L.Ed. 168 this Court stated that in regard to awards of costs, a federal court was justified in "treating the state just as any other litigant, and in imposing costs upon it." In *Kentucky v. Graham*, ___ U.S. ___ 105 S.Ct. 3099 (1985), this Court held that *Hutto v. Finney, supra*, did not alter the basic philosophy that liability on the merits and responsibility for costs and fees go hand in hand and that hence where a defendant has not been prevailed against, § 1988 does not authorize a fee award against that defendent, nor did *Hutto v. Finney, supra*, hold or suggest that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity.

In the instant case, unlike the situation in *Hutto v. Finney, supra*, the defendant prison officials were sued in their personal capacities for damages and were the prevailing parties. In light of this Court's opinion in *Kentucky v. Graham, supra*, the Seventh Circuit had no authority to impose the cost of preparing the transcript on the trial on the State of Indiana.

The order of the Seventh Circuit is therefore in direct and irreconcilable conflict with the decisions of this Court in *Kentucky v. Graham, supra*, and *Hutto v. Finney, supra*, and a writ of certiorari should be allowed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the order for the Seventh Circuit should be granted.

Respectfully submitted,

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RICHARD C. WEBSTER
Deputy Attorney General

KERMIT R. HILLES
Deputy Attorney General

Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 4, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

SIDNEY JONES,	)
	)
Plaintiff-Apppellant,	) Appeal from the
	) United States Court
No. 87-2378 vs.	) for the Southern
	) District of Indiana,
COUNSEL HAMELMAN,	) Indianapolis Division
SGT. HAMPTON,	) No. IP-84-1199-C
OFFICER LIKENS, and	) J. Patrick Endsley,
OFFICER SWAIN,	) Magistrate.
Defendants-Appellees.	)
	)

ORDER

The State of Indiana is hereby ordered to file a transcript of the trial proceedings before Magistrate Endsley within 10 days if the transcript already has been typed, or thirty days from today if the transcript requires typing.

The Appellant has thirty days from such filing to file a brief relying on the transcript; the State has fifteen days to answer; and the Appellant has ten days in which to reply.

The matter will be submitted to the present panel for decision without further oral argument from either side.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

SIDNEY JONES,	) Appeal from the
	) United States Court
Plaintiff-Apppellant,	) for the Southern
	) District of Indiana,
No. 87-2378 vs.	) Indianapolis Division
	) No. IP-84-1199-C
COUNSELOR HAMELMAN, et al.,	) J. Patrick Endsley,
Defendants-Appellees.	) *Magistrate.*
	)

ORDER

The State of Indiana's motion for stay of this court's April 4, 1988 order directing the State to file a transcript of the trial proceedings before Magistrate Endsley is DENIED.

Moreover, construing the State's petition for rehearing with suggestion for rehearing *en banc* as a motion for reconsideration of our April 4th order, this motion is also DENIED.

The State is hereby ordered to produce the transcript within ten days or in the alternative to present a reasonable timetable for the filing of the transcript.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIDNEY JONES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP 84-1199-C
	)	
COUNSELOR HAMELMAN,	)	
SGT. HAMPTON,	)	
OFFICER (LACKY) LIKENS, and	)	
OFFICER (SWAINY) SWAIN,	)	
	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint. Costs versus plaintiff.

Dated this 27th day of July, 1987.

/s/ J. PATRICK ENDSLEY,
Magistrate
United States District Court
Southern District of Indiana

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-2102

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

vs.

SIDNEY JONES,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

VS.

SIDNEY JONES,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

THE RESPONDENT, SIDNEY JONES, ASKS LEAVE TO PROCEED IN FORMA PAUPERIS WITHOUT PREPAYMENT OF COSTS OR TO GIVE SECURITY THEREFORE. RESPONDENT WAS ORIGINALLY GRANTED LEAVE TO SO PROCEED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, BUT AS THE MATTER PROGRESSED TO APPEAL, LEAVE TO PROCEED IN FORMA PAUPERIS WAS DENIED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR REASONS UNRELATED TO RESPONDENT'S FINANCIAL STATUS. RESPONDENT'S AFFIDAVIT IN SUPPORT OF THIS MOTION IS ATTACHED HERETO.

Richard E. Culley

RICHARD E. CULLEY

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-2102

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

VS.

SIDNEY JONES,

RESPONDENT.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, SIDNEY JONES, BEING FIRST DULY SWORN, DEPOSE AND SAY THAT I AM THE RESPONDENT IN THE ABOVE-ENTITLED CASE; THAT IN SUPPORT OF MY MOTION TO PROCEED IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WITHOUT BEING REQUIRED TO PREPAY FEES, COSTS OR GIVE SECURITY THEREFOR, I STATE THAT BECAUSE OF MY POVERTY I AM UNABLE TO PAY THE COSTS OF SAID PROCEEDING OR TO GIVE SECURITY THEREFOR; THAT I BELIEVE I AM ENTITLED TO REDRESS; AND THAT THE ISSUES I DESIRE TO PRESENT ON APPEAL ARE THE FOLLOWING:

A. THE SEVENTH CIRCUIT ACTED WHOLLY WITHIN ITS DISCRETION IN AWARDING COSTS AGAINST A PREVAILING PARTY AND THE AWARD OF COSTS AGAINST THE STATE OF INDIANA, WHICH IS THE REAL PARTY IN INTEREST, IS NOT PROHIBITED BY THE ELEVENTH AMENDMENT, AS PREVIOUSLY HELD BY THIS COURT, WHEN ALL PERSONS HAVE A RIGHT TO APPEAL IN INDIANA.

I FURTHER SWEAR THAT THE RESPONSES WHICH I HAVE MADE TO THE QUESTIONS AND INSTRUCTIONS BELOW RELATING TO MY ABILITY TO PAY THE COST OF PROSECUTING THIS ACTION ARE TRUE.

1. ARE YOU PRESENTLY EMPLOYED? No

A IF THE ANSWER IS YES, STATE THE AMOUNT OF YOUR SALARY OR WAGES PER MONTH AND GIVE THE NAME AND ADDRESS OR YOUR EMPLOYER.

Not applicable

B IF THE ANSWER IS NO, STATE THE DATE OF YOUR LAST EMPLOYMENT AND THE AMOUNT OF SALARY OR WAGES PER MONTH WHICH YOU RECEIVED.

Last employment was in 1980 at $600.00 per month

2. HAVE YOU RECEIVED WITHIN THE PAST TWELVE MONTHS ANY INCOME FROM A BUSINESS, PROFESSION OR OTHER FORM OF SELF-EMPLOYMENT, OR IN THE FORM OF RENT PAYMENTS, INTEREST, DIVIDENDS OR OTHER SOURCE?

No

3. DO YOU OWN ANY CASH OR CHECKING OR SAVINGS ACCOUNTS?

Yes

A. IF THE ANSWER IS YES, STATE THE TOTAL VALUE OF THE ITEMS OWNED.

See attached Warden's Certificate of Inmate's Trust Account.

4. DO YOU OWN ANY REAL ESTATE, STOCKS, BONDS, NOTES, AUTOMOBILES OR OTHER VALUABLE PROPERTY (EXCLUDING ORDINARY HOUSEHOLD FURNISHINGS AND CLOTHING)?

No

5. LIST THE PERSONS WHO ARE DEPENDENT UPON YOU FOR SUPPORT AND STATE YOUR RELATIONSHIP TO THOSE PERSONS.

None

I UNDERSTAND THAT A FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Ludwig Jones #23940
SIDNEY JONES

STATE OF INDIANA)
) SS:
COUNTY OF MADISON)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20 DAY OF JULY, 1988.

Deborah A Sands
NOTARY PUBLIC

MY COMMISSION EXPIRES:

6 - 21 - 92
(MONTH) (DATE) (YEAR)

Deborah A SANDS
PRINTED NAME

MADISON
COUNTY OF RESIDENCE

WARDEN'S CERTIFICATE OF
INMATE'S TRUST ACCOUNT

THE UNDERSIGNED WARDEN, OR HIS DULY AUTHORIZED REPRESENTATIVE AT THE INDIANA REFORMATORY, PENDLETON, INDIANA, HEREBY CERTIFIES THAT THE RESPONDENT, SIDNEY JONES, D.O.C. #23940, HAS AS OF THIS DATE A TRUST FUND BALANCE OF $ .20 .

DATED THIS 5 DAY OF JULY, 1988.

Craig Hanks
SIGNATURE

CRAIG HANKS
PRINTED NAME

Asst Supt.
TITLE

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-2102

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

vs.

SIDNEY JONES,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD E. CULLEY

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INDEX

TABLE OF AUTHORITIES II

OPINION BELOW 1

OPPOSITION TO PETITIONER'S
JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

THE SEVENTH CIRCUIT ACTED WHOLLY
WITHIN ITS DISCRETION IN ASSESSING
COSTS AGAINST A REAL PARTY IN
INTEREST 4

THE IS NO ELEVENTH AMENDMENT
IMMUNITY IN THIS FACTUAL
SITUATION 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES:

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) 5

Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976) 5

French v. Owens, 777 F.2d 1250 (7th Cir. 1985) 5

Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973) 5

Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), rehearing denied, 439 U.S. 1129, 99 S.Ct. 1035 (1979) 4, 5

Jones v. Schellenberger, 225 F.2d 784 (7th Cir. 1955) 4

Sims v. Amos, 340 F.Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972) 5

STATUTES:

28 U.S.C. §2101(b) 2

42 U.S.C. §1983 2

Ind.Code §34-4-16.7-1 ..... 4, 5

RULES:

Supreme Court Rule 20.2 2

Supreme Court Rule 21.1(b) 2

Supreme Court Rule 33.2(a)(7) 2

Supreme Court Rule 33.2(c) 2

Fed.R.Civ.Proc. 54(d) 4

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-2102

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

VS.

SIDNEY JONES,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT, SIDNEY JONES, RESPECTFULLY PRAYS THIS COURT TO DENY THE ISSUANCE OF A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THEREBY REFUSING TO REVIEW THE INTERLOCUTORY DECISION ENTERED BY THAT COURT ON THE 4TH DAY OF APRIL, 1988, IN CAUSE NUMBER 87-2387.

OPINION BELOW

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ENTERED AN ORDER ON APRIL 4, 1988. THIS INTERLOCUTORY OPINION MAY BE FOUND IN APPENDIX A-1 OF PETITIONER'S PETITION AND WAS NOT REPORTED. REHEARING WAS DENIED ON MAY 23, 1988.

OPPOSITION TO PETITIONER'S JURISDICTIONAL STATEMENT

PETITIONER HAS WAIVED JURISDICTION OF THIS COURT TO REVIEW THE INTERLOCUTORY OPINION OF THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit by: first, failing to file a timely petition; and second, by failing to comply with Rule 21.1(b) and Rule 33.2(c) of this Court.

The interlocutory opinion of the United States Court of Appeals for the Seventh Circuit was entered on April 4, 1988, with rehearing denied on May 25, 1988. The Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was not docketed with this Court until June 25, 1988, the thirty-third (33rd) day after rehearing was denied. A copy of the notice of docketing is appended heret to at page RA-1. This proceeding is thus foreclosed by 28 U.S.C. §2101(b) and Rule 20.2 of this Court.

Further, Petitioner has failed to comply with Rule 21.1(b) of this Court. The petition emphasizes that Petitioner, State of Indiana is not a party to the proceedings below. (Petition at, i, ii, 1, 2, 4 and 6). Petitioner has informed this Court that "four individually named employees of the Indiana Reformatory" were the sole defendants in the District Court (Petition at 3), but has not apprised the Court as to the identity of the parties below, or if any, all, or none of the parties below are parties before the United States Court of Appeals for the Seventh Circuit or this Court.

Additionally, Petitioner has failed to comply with Rule 33.2 (a)(7) of this Court.

For these reasons, Respondent urges the Court to dismiss this action, and to take any and all other actions the Court deems proper in its discretion; including, but not limited to, imposition of costs upon Petitioner.

STATEMENT OF THE CASE

Respondent, a prisoner at the Indiana Reformatory, filed a civil complaint seeking damages pursuant to 42 U.S.C. §1983 for

WILLFUL FAILURE TO PROTECT HIM FROM AN ASSAULT BY FELLOW INMATES RESULTING HIS BEING STABBED IN THE AREA OF THE NECK SIX (6) TIMES WHILE A DEFENDANT EMPLOYEE OF THE STATE OF INDIANA STOOD IDLY BY AND WATCHED THE VICIOUS ASSAULT. THE PRO SE COMPLAINT NAMED THE PETITIONER, STATE OF INDIANA, AND SEVERAL EMPLOYEES OF THE STATE OF INDIANA AS DEFENDANTS, WITH THE STATE OF INDIANA AND SOME OF THE EMPLOYEES BEING DISMISSED AS DEFENDANTS PRIOR TO TRIAL.

AFTER A BENCH TRIAL, HELD PARTIALLY AT THE INDIANA REFORMATORY (HEREINAFTER "IR") AND PARTIALLY AT THE UNITED STATES COURTHOUSE IN INDIANAPOLIS, INDIANA, ON JULY 13-16, 1987, THE DISTRICT COURT ENTERED JUDGMENT FOR THE DEFENDANT EMPLOYEES OF THE STATE OF INDIANA.

RESPONDENT SOUGHT A CERTIFICATE OF PROBABLE CAUSE FOR APPEAL BECAUSE ON THE SECOND DAY OF TRIAL HE WAS CONFINED TO THE IR'S HOSPITAL RESTRAINT UNIT. THE HOSPITAL RESTRAINT UNIT IS USED TO CONFINE INMATES WITH PSYCHIATRIC PROBLEMS AND WHO ARE DANGEROUS TO THEMSELVES. RESPONDENT'S CONFINEMENT IN THE HOSPITAL RESTRAINT UNIT WAS THE DIRECT RESULT OF HIS REPORT TO THE IR'S "ADMINISTRATIVE ASSISTANT" ON JULY 14, 1987, THAT HE WAS THREATENED BY AN EMPLOYEE OF THE STATE OF INDIANA, CORRECTIONAL OFFICER LIKENS. RESPONDENT REMAINED CONFINED TO THE HOSPITAL RESTRAINT UNIT UNTIL HE WAS COERCED BY THE IR SUPERINTENDENT, EDWARD L. COHN (WHO IS CURRENTLY ON SUSPENSION FOR VIOLATIONS OF FRENCH V. OWENS, 777 F.2D 1250 (7TH CIR. 1985)), TO SIGN A DOCUMENT STATING THAT RESPONDENT WAS NOT IN FEAR FOR HIS SAFETY AND RELEASING THE STATE OF INDIANA AND ITS EMPLOYEES FROM LIABILITY. A COPY OF RESPONDENT'S AFFIDAVIT IS APPENDED HERETO AT PAGE RA-2.

RESPONDENT'S COUNSEL WAS UNAWARE OF THESE ACTIONS UNTIL AFTER THE CLOSE OF THE TRIAL DUE TO RESTRICTIONS PLACED UPON ATTORNEY-CLIENT COUNSELTATIONS BY THE IR SUPERINTENDENT. A COPY OF THE RESPONDENT'S MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION IS APPENDED HERETO AT PAGE A-4.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit Acted Wholly Within Its Discretion In Assessing Costs Against A Real Party In Interest.

Federal Rules of Civil Procedure, Rule 54(d), provides that the court may direct that costs be assessed against one other than the prevailing party. This is wholly within the discretion of the court and is reviewable only for an abuse of discretion. Assessment of costs against a prevailing party is not a new development in our system of law. See: Jones v. Schellenberger, 225 F.2d 784 (7th Cir. 1955). The turning point has been a showing of "reprehensible" conduct. Schellenberger, supra. Of course, the actions of the State of Indiana, through its agents, shows a total disregard for the rights of individuals and to attempt to coerce waiver of Respondent's cause of action by tactics smacking of totalatarian regimes.

Additionally, the State of Indiana is he real party in interest here. Ind. Code §34-4-16.7-1 provides that in the event of a public employee becoming subject to personal civil liability for an act within the scope of his employment which violates the civil rights laws of the United States, the governmental entity which employs shall pay any judgment, compromise or settlement of the claim or suit. Thus, the Seventh Circuit's Order that the State of Indiana pay for the transcript of trial proceedings was nothing more than a manner of goin directly to the source. See: Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), rehearing denied, 439 U.S. 1129, 99 S.Ct. 1035 (1979).

2. There Is No Eleventh Amendment Immunity In This Factual Situation.

The costs of litigation have "traditionally been awarded without regard for the state's Eleventh Amendment immunity. The court has

never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." Hutto v. Finney, 437 U.S. 678, 696, 98 S.Ct. 2565, 2576, 57 L.Ed.2d 522 (1978), rehearing denied, 439 U.S. 1129, 99 S.Ct. 1035 (1979).

The matter here, is to all intents and purposes an action against the State of Indiana, although naming the prison employees individually. The State of Indiana has accepted liability for non-criminal civil rights violations committed by its employees while acting within the scope of their employment. Ind. Code §34-4-16.7-1

In Sims v. Amos, 340 F.Supp. 691 (M.D.Ala.), aff'd, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), costs and attorney's fees were awarded to the plaintiffs by the District Court. 340 F.Supp. 691. In this Court, the defendants specifically raised Eleventh Amendment immunity, with the result being the lower court was summarily affirmed.

In Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976) the district court awarded attorney fees against defendant State of Indiana officials based upon the private attorney general theory (later defunct by reason of Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (9175)), and on the defendant's bad faith in failing to comply with federal law both before the action was commenced and in the course of the litigation. Bond, at 689.

Of course, the Court has held that bad faith which is the basis for the award may be in the conduct which necessitated the action or in conduct occurring during the course of the action. Hall v. Cole, 412 U.S. 1, 15, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

Here, the bad faith was the actions of the State of Indiana's agent, Edward Cohn, Superintendent of the IR, in confining Respondent in a psychiatric unit until Respondent was coerced into signing a document that he was not in danger and releasing the State of Indiana from liability.

ADDITIONALLY, THE ACTIONS OF THE STATE OF INDIANA'S AGENT IN CONFINING RESPONDENT TO A PSYCHIATRIC UNIT COMPLETELY DENIED ACCESS TO COUNSEL DURING THREE OF THE FOUR DAYS OF TRIAL.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT SHOULD BE DENIED.

RESPECTFULLY SUBMITTED,

Richard E. Culley
RICHARD E. CULLEY

1025 NORTH RITTER AVENUE
INDIANAPOLIS, INDIANA 46219

PH: (317) 356-2726

ATTORNEY FOR RESPONDENT
PRO BONO

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-2102

OCTOBER TERM, 1987

STATE OF INDIANA,

PETITIONER,

VS.

SIDNEY JONES,

RESPONDENT.

APPENDIX

INDEX

Notice of Docketing RA-1

Respondent's Affidavit RA-2

Motion for a Temporary Restraining Order Or In the Alternative, Preliminary Injunction RA-4

SUPREME COURT OF THE UNITED STATES

STATE OF INDIANA
Petitioner—Appellant

No. 87-2102

SIDNEY JONES
Respondent—Appellee

To RICHARD E. CULLEY Counsel for Respondent—Appellee:

YOU ARE HEREBY NOTIFIED that a petition for a writ of certiorari—an appeal—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 25th day of June, 19 87.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed with the Clerk by the counsel of record who will represent your party. The form should be filed at or before the time you file your response to our petition—jurisdictional statement.

Only counsel of record can expect to receive notification of the Court's action(s) in this case.

Linda R. Hill
Counsel for Petitioner—Appellant

219 State House
Number and Street

Indianapolis, Ind. 46204
City, State and Zip Code

(317) 232-6312
Telephone Number

NOTE: Please indicate whether the case is a petition for certiorari or an appeal by crossing out the inapplicable terms. A copy of this notice should *NOT* be filed in the Supreme Court.

CO-75A

RA-1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SIDNEY JONES,	)	Appeal from the United States
	)	District Court for the Southern
Plaintiff-Appellant,	)	District of Indiana, Indiana-
	)	polis Division.
No. 87-2378 vs.	)	
	)	
COUNSELOR HAMELMAN, et al.,	)	Honorable J. Patrick Endsley
	)	Magistrate.
Defendants-Appellees.	)	

AFFIDAVIT

Comes now Sidney Jones, and being duly sworn upon his oath says as follows:

1. I have personal knowledge of the facts stated herein.

2. On July 13, 1987, after my trial, I returned to my cell, Officer Dennis Likens (brother of Officer Thomas Likens, Defendant) told me he was going to make my time real hard for me.

3. On July 14, 1987, I told Jon Beck, administrative assistant at the Indiana Reformatory, of Officer Liken's threat and that I was afraid of the threat. I also advised Mr. Beck that I would not allow anyone to harm me again and asked to be transferred to another institution.

4. Mr. Beck advised me that he could not transfer me to another institution, but offered to put me on protective custody.

5. I advised Mr. Beck that protective custody was not safe due to the fact that the general prison population has free access to the protective custody cells and this would only make things worse for me.

6. After speaking with Mr. Beck on July 14, 1987, I returned to my cell and spoke with Mr. Cook, a counselor about the matter.

7. While I was speaking to Mr. Cook, and about ten (10) minutes after I left Mr. Beck, correctional sargeant Jayne came and told

PA-2

me I was being transferred to the Hospital Restraint Unit of the Indiana Reformatory.

8. The Hospital Restraint Unit is used for inmates on disciplinary segregation and psychiatric patients who are self-destructive.

9. While on the Hospital Restraint Unit, items of my personal property was stolen and I was not allowed to have any toiletries so I was unable to care for my personal hygiene.

10. I continued to ask why I was placed in the Hospital Restraint Unit, but everyone I spoke to only would tell me I would be there until I spoke with Mr. Cohn, Superintendent of the Indiana Reformatory.

11. On July 23, 1987, I finally spoke with Mr. Cohn, who curse me and threatened to keep me on Hospital Restraint Unit for the remainder of my sentence. Sgt. Plank was also present.

12. I was told by Mr. Cohn that the only way I would be able to leave the Hospital Restraint Unit was to write a statement that my life was not in danger.

13. I wrote the statement that my life was not in danger in order to leave the Hospital Restraint Unit.

14. I was then released from the Hospital Restraint Unit on July 25, 1987.

15. After the first day of my trial was over, I had no access to my lawyer.

And further Affiant sayeth not.

Sidney Jones 23940
SIDNEY JONES

dated: April 1, 1988

My commission Expires 4-11-1991 Jannette Cook
JANNETTE COOK, NOTARY PUBLIC
My Residence is MARION Co.

PA-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIDNEY JONES,	:	
Plaintiff,	:	
vs.	:	CAUSE NO. IP 84-1199-C
COUNSELOR HAMELMAN, et al.,	:	
Defendants.	:	

MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

Plaintiff, Sidney Jones, by counsel, Richard E. Culley, respectfully move this Court to issue an immediate Temporary Restraining Order or, in the alternative for a Preliminary Injunction pursuant to Federal Rules of Civil Procedure 65, pending the outcome of the trial of this cause. Hence, restraining and enjoining Edward L. Cohn, Superintendent of the State Reformatory, at Pendleton, Indiana, his Agents, Employees and all those acting in concert with him from:

1. Limiting plaintiff's access to counsel as fixed in Exhibit "A" attached hereto and made apart hereof;

2. Interfering with counsel's access to his witnesses who are residents at the State Reformatory, Pendleton, Indiana;

PA-4

3. Intimidation of plaintiff's witnesses, and otherwise depriving plaintiff of access to the court and counsel.

In support of his motion, plaintiff would submit the attached affidavits with his accompanying memorandum to establish a legal basis for granting the relief sought. No prior application for relief sought in this motion has been made.

WHEREFORE, the Court should grant a Temporary Restraining Order or, in the alternative, a Preliminary Injunction enjoining Edward L. Cohn, Superintendent of the State Reformatory, his agents and employees from use of any regulation which unreasonably limits and restricts access to counsel and courts.

Respectfully submitted,

Richard E. Culley

Richard E. Culley
Attorney for the plaintiff

1025 North Ritter
Avenue
Indianapolis, Indiana 46219
Telephone (317) 356-2726

14 + 5

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION has been duly served on the attorney for the defendants' by depositing same in the United States Mail, first-class postage prepaid, this 6th day of July, 1987:

Mr. Kermit Hilles,
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Richard E. Culley
Richard E. Culley

R87-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIDENY JONES,

Plaintiff,

vs. : CAUSE NO. IP 84-1199-C

COUNSELOR HAMELMAN, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

In this cause of action, the plaintiff Sidney Jones has filed a complaint in this court alleging that certain of his constitutional rights have been violated by officials of the State Reformatory, Pendleton, Indiana. On April 20, 1987, the Superintendent of the State Reformatory issued a regulation limiting and restricting plaintiff's access to counsel. See Exhibit "A" attached hereto and made apart hereof.

The plaintiff's case is sechduled for trial before this court on the 13th and 14th days of July, 1987, and several of his witnesses are residents of the State Reformatory. The restricting regulation issued April 20, 1987, unreasonably limits counsel access to plaintiff and his resident witnesses, and will severely harm plaintiff in the preperation for the trial of his case.

PA-7

The right of access to the courts is fundamental, Bounds v. Smith, 430 U.S. 817, 821-23, 97 S.Ct.1491, 1494-95, 52 L.Ed. 2d 72 (1977); Washington v. James, 786 F. 2d 1134, 1138 (2nd Cir. 1986); Procup v. Strickland, 760 F. 2d 1107, 1110 n. 4 (11th Cir. 1985) (sources of right of access include the First Amendment, the Due Process Clause of Fifth and Fourteenth Amendments, and the Privileges and Immunities Clause of Article IV, section 2). The right of access to the courts is substantive rather than procedural. Its exercise can be shaped and guided by the State, Bounds, 430 U.S. at 825, 97 S.Ct. at 1490, but cannot be obstructed, regardless of the procedural means applied. Johnson v. Avery, 393 U.S. 483, 485, 89 S.Ct. 747, 748, 21 L.Ed. 2d 718 (1969) ("(I)t is findamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed,"); see Daniels v. Williams, _____U.S._____, _____, 106 S.Ct. 662, 677, 88 L.Ed. 2d 662 (1986) (Stevens, J., Concurring in the judgment) ("(I)f the Federal Constitution prohibits a State from taking certain action 'regardless of the fairness of the procedures used to implement them,' the constitutional violation is complete as soon as the prohibited action is taken ....") (citation omitted).

A-7-8

On several occasions officials have deliberately interfered with counsel's access to the plaintiff and his witnesses by limiting the time for consulting with them to the hours of access from 7:30 a.m., until 2:30 p.m. Counsel for the plaintiff, on June 5, 1987, sent Edward L. Cohn, Superintendent of the Reformatory at Pendleton, Indiana a letter advising that he had received the April 20, 1987 directive. Counsel also requested that he be approved to visit his clients at other reasonable times, and received no response. Exhibit "B" attached hereto and made apart hereof.

On May 31, 1987, one of counsel's clients sent an inter-office memorandum to Edward L. Cohn requesting that the restrictive regulation be clarified. Again, there was no official response. Exhibit "C" attached hereto and made apart hereof. On July 3, 1987, counsel arrived at the State Reformatory at approximately 1:30 p.m., to consult with a client and was ordered to leave at 2:30 p.m., even though counsel had phoned in advance of his visiting with his client.

The plaintiff, Sidney Jones, in order to obtain a preliminary injunction must establish at least a reasonable likelihood of success on the merits; no adequate remedy at law and the prospect of irreparable harm; the threatened injury outweighs the threatened harm the preliminary

PA-9

injunction will cause the defendants; and the granting of the preliminary injunction will not disserve the public. Godinez v. Lane, 733 F. 2d 1250, 1257 (7th Cir. 1984), see, Walters v. Thompson, 615 F. Supp. 330 (D.C. Ill. 1985).

Plaintiff's Jones complaint in this Court meets each of the above requirements for the issuance of an injunction. Furthermore, the Supreme Court in deciding the issue of access to courts held, that regulations and practices that unjustifiable obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid, Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974).

For all the reasons herein stated, this Court is urged to grant plaintiff's motion for a temporary restraining order or, in the alternative, for a preliminary injunction.

Richard Culley
Richard E. Culley
Attorney for the plaintiff

RA-10

April 20, 1987

TO: ALL CONCERNED

FROM: Edward L. Cohn, Superintendent

RE: Attorney Visits

The institution recognizes the need to provide attorneys reasonable access to their incarcerated clients. However, recently attorneys have been arriving at the institution during late evening hours. This has been happening with no advanced notice or pre-arranged authorization. This has required extra staff for processing and supervision of these interviews.

Therefore, the following policy shall be effective **Monday, May 18, 1987:**

Attorney/client interviews shall take place during normal institutional visiting hours (7:30 A.M. - 2:40 P.M.). Any other time for attorney/client interviews must be pre-approved and pre-arranged primarily through the office of the Release Coordinator. The Superintendent, Assistant Superintendent/Operations, Assistant Superintendent/Programs, Custody Supervisor, or Unit Managers may also arrange these interviews. This approval will be in writing and available to Control and the Shift Supervisor's office.

When scheduling attorney/client interviews on Second Shift, it is important to remember the schedule is very busy. The institutional count times are 7:30 A.M., 12:00 noon, 3:30 P.M., and 8:00 P.M., and the volunteer evening activities are from 6:00 P.M. to 8:00 P.M. During this time frame, telephone calls, showers, and recreation are also in progress.

Edward L. Cohn, Supt.
INDIANA REFORMATORY

ELC:jw

cc: C. Hanks, S. McCauley, Major Scrogham, Unit Managers, Shift Supervisors, Department Heads, Control, Information Desk (POST), Visiting Room Officer, Visitor's Waiting Room (POST), Housing Units (POST), Work Locations (POST), Radio Cage, file

PA-11

RICHARD E. CULLEY
Attorney -at- Law
1025 North Ritter Avenue
Indianapolis, IN 46219

(317) 356-2726

June 5, 1987

Mr. Edward Cohn
Superintendent, Indiana
State Reformatory
Box 30
Pendleton, IN 46064

RE: Attorney visits

Dear Mr. Cohn:

Pursuant to your directive of April 20, 1987 concerning attorney visits, I would ask that I be permitted approval for visitation during normal departmental working hours, and at other reasonable times. I am making this request for at least two reasons:

a. I am attorney of record for several residents confined at your institution and representing them in various legal matters. I am the victim of vision impairment and such a condition requires extensive review and personal contact with my clients for purpose of evaluating motions and pleading, etc.

b. Due to my vision impairment, I am unable to drive an auto and must coordinate transportation in meeting several schedules, including visiting my clients at your institution. Therefore, permission is requested that I be approved to visit at other reasonable times, so long as these visits do not conflict with volunteer evening activities. With your written approval, I would be permitted to contact the control room in coordinating my visiting schedules with clients at your institution.

Your approval shall be considered and of course appreciated.

Very truly yours,

Richard Culley

Richard Culley

REC/jc
file
cc: John T. Shettle

RA-12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIDNEY JONES,

Plaintiff,

vs. : CAUSE NO. IP 84-1199-C

COUNSELOR HAMELMAN, et al.,

Defendants.

COUNSEL'S AFFIDAVIT IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

I, RICHARD E. CULLEY, being first duly sworn according to law, respectfully states:

1. I am counsel of record in the above captioned cause, which is presently secheduled for trial in this Court on the 13th and 14th days of July, 1987.

2. I am also counsel of record in Norman E. Ford, et. al., v. R.A. Nona, et al., cause number S 84-0054 scheduled for pretrial conference in the United States District Court for the Northern District of Indiana in August, 1987, wherein James Hendrix is a party plaintiff. Also, I am counsel of record in Michael Todd Ellis v. Cub Foods, Marion Circuit Court, cause number S 386 0507, both plaintiff's are residents-inmates at the State Reformatory, Pendleton, Indiana.

3. On May 31, 1987, I arrived at the Reformatory at 12:30 p.m., to meet and consult with clients. I was not permitted to do so until 2:00 p.m., and then ordered to leave after only 45 minutes.

4. On June 5, 1987, I sent a letter to Mr. Edward L. Cohn advising him that I had received a copy of his directive concerning attorney visits and requesting that I be permitted to consult with clients at other reasonable times. I received no response to that letter.

5. On July 3, 1987, I arrived at the State Reformatory at 1:30 p.m., to interview witnesses in the Jones case, and was ordered to leave at 2:45 p.m.

6. The regulation limiting counsel's access to the plaintiff and his inmate witnesses poses severe hardships on counsel and deprives plaintiff of meaningful access to the court. The regulation effectively hampers counsel's ability to complete preparation for the trial of this cause scheduled for the 13th and 14th days of July, 1987.

FURTHER AFFIANT SAYETH NOT.

Richard E. Culley

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Subscribed and sworn to before me a Notary Public, in and for Said County and State on this 5th day of July, 1987:

My Commission Expires:
MARCH 28, 1989

Frances Brownsing
Notary Public

FRANCES BROWNSING

PA-14